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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 965

BURK BROTHERS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

WALTER T. FAHY,
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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Burk Brothers, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a final judgment and decree of said court entered February 17, 1941 (R. 229), affirming an Order of the National Labor Relations Board (hereinafter referred to as the Board) dated March 27, 1940 (R. 37), which directed petitioner to desist from certain alleged unfair labor practices under the National Labor Relations Act (49 Stat. 449), and to take certain affirmative action.

Opinions Below.

The decision and order of the Board (R. 37) was issued on March 27, 1940. The opinion and dissenting opinions of the Circuit Court of Appeals (R. 218) was handed down on February 17, 1941, and is reported at 117 F. (2d) 686 (advance Reports 117 F. (2d) No. 4 of March 31, 1941).

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 40 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938) 28 U. S. C., Sec. 147 (a); and Section 10 (e) of the National Labor Relations Act. 29 U. S. C. 160 (e), p. 98.

The decree of the Circuit Court of Appeals for the Third Circuit to be reviewed was entered February 17, 1941 (R. 229).

Questions Presented.

The National Labor Relations Board upon charges filed by Local No. 30 of the National Leather Workers Association (R. 10), issued its complaint against Burk Brothers alleging unfair labor practices affecting commerce in that it had discriminatorily terminated the employment of four employees, and thereafter refused to reinstate them, because of union activities (R. 15). A hearing was had before a trial examiner who recommended the reinstatement of two employees and that the complaint as to the other two be dismissed (R. 19, 35). A year later a review of the hearing was had before the National Labor Relations Board which approved the finding of the trial examiner as to the reinstatement of two and overruled his findings as to the other two and directed that all four be reinstated with back pay (R. 37, 64). The matter was appealed to the United States Circuit Court of Appeals for the Third Cir-

cuit which sustained the findings of the National Labor Relations Board by a divided court (R. 218).

It is contended by petitioner that the evidence is not substantial, as was found by the trial examiner and not sufficient to sustain the findings of the Board.

Statement.

On May 28, 1938, the Regional Director of the Fourth District of the National Labor Relations Board, upon charges filed by Local No. 30, National Leather Workers' Association, issued its complaint against Burk Brothers, alleging that it had engaged in unfair labor practices affecting commerce, in that it had discriminatorily terminated the employment of Joseph Zalot, Kosta Kula, Charles Majerick and Frank Majerick, and thereafter refused to reinstate them, because of union activities (R. 15).

On June 6, 1938, Burk Brothers filed its answer, denying these charges, but admitted that it had terminated the employment of Zalot and Charles Majerick, and had laid off Kosta Kula and Frank Majerick, due to curtailment of production, and that they would be sent for when conditions improved (R. 18). A hearing was had on January 5 and 6, 1939, before Trial Examiner Ward.

Between the filing of the complaint and the date of the hearing, numerous efforts were made by the Board and Burk Brothers to settle the matter. Regional Director Root and later Regional Director Schauffler called with their counsel and assistants, privately interviewed employees, and examined books, and finally advised Burk Brothers, that if Zalot, Kula and Frank Majerick were reinstated at some job without back pay, they would recommend the dropping of the proceedings, to which Burk Brothers agreed and sent for these three. Their conclusion was that Charles Majerick had been discharged for cause (R. 203, 213, 214, 215) (R. 25).

Zalot and Kula were reinstated December 8, 1938 and have since been continuously employed.

Frank Majerick was offered a position different from his original work, with the promise of his old job as soon as possible. He refused to return (R. 125).

The Trial Examiner filed his Intermediate Report on March 3, 1939, in which he found that Zalot and Kula had been improperly laid off, and recommended their reinstatemen with back pay from the dates of their original discharge; that Frank Majerick had been laid off because of the lowered production and should be reinstated to the first vacancy, and that Charles Majerick had been discharged for cause (R. 19-36).

Exceptions were filed by Burk Brothers to the reinstatement of Zalot and Kula with back pay, and by the Union to the dismissal of the two Majericks (R. 41). Oral argument before the full Board at Washington was had on October 24, 1939, and on March 27, 1940, the Board filed its decision dismissing Burk's Exceptions as to Zalot and Kula, and sustaining the Union's Exceptions as to the two Majericks, and ordered that all four be reinstated with back pay, and that Burk post the usual notices throughout the factory (R. 37-65).

A petition for review was filed in the Circuit Court of Appeals for the Third Circuit on April 17, 1940 (R. 1) and the Board filed its Answer on May 20, 1940. The case was argued before the Court of Appeals for the Third Circuit on October 7th, 1940, and the court filed its Opinion on February 3rd, 1941, two of the Judges, Biggs and Maris, J., sustaining the findings of the National Labor Relations Board, and one, Clark, J. dissenting (R. 218-229).

Specifications of Error.

The United States Circuit Court of Appeals for the Third Circuit erred in the following respects:

1. In sustaining the conclusions of the Board that the evidence taken before the Trial Examiner was substantial, and sufficient to sustain the Finding that Charles Majerick and Frank Majerick were discharged for union activities.

2. In approving the order of the Board that Charles Majerick and Frank Majerick be reinstated to their original positions with back pay.

3. In sustaining the Findings of the Board in overruling the Findings of the Trial Examiner that Charles Majerick and Frank Majerick had not been discharged for union activities.

4. In failing to overrule the Findings of the Board, and in not sustaining the Findings of the Trial Examiner that Charles Majerick had not been discharged for union activities.

Reasons for Granting the Writ.

Burk Brothers are manufacturers of glazed kid leather with a normal output of 1000 dozens a day. In January, 1937, the output was 700 dozens; in May and June it was 500 dozens, while later in the year it was reduced to 300 dozens. Reduction of production necessitated reduction in force, and between June and December, 1937, from 75 to 88 men were laid off. Of these, six were members of the Union, which claimed discrimination as to 4, though Frank Majerick, who was very active in union affairs and wore a union button on his cap for months, was retained until the last.

We realize that the Board is not bound by ordinary rules of evidence; however, it must not grasp at straws, but must base its findings on substantial evidence, and not on inference alone.

While petitioner denies that union activities were responsible for the dismissal of Zalot and Kosta Kula, as they were reinstated at the suggestion of the Regional

Board Director and have since been continuously employed, the question as to them becomes very largely moot.

As far as Charles Majerick is concerned, there is not even a scintilla of evidence to show that his union membership had anything to do with his discharge. There is, however, positive and substantial evidence that petitioner was fully justified in dismissing him.

The Trial Examiner, who had the opportunity of seeing the witness found Charles Majerick had been discharged for cause. The record shows, and Majerick admitted, he had an argument with Lehman, his foreman—or assistant foreman (R. 80), and three witnesses testified Majerick had made a number of derogatory remarks to Lehman (R. 190, 197, 198) Lehman complained to the factory superintendent, who directed that Majerick be discharged. Miller, the foreman—who, it is alleged, was so hostile to the Union—disobeyed the superintendent's orders and instead of discharging Majerick, put him in another department, and kept him for over a month, because of Miller's regard for Majerick's father. Miller finally laid him off when production slackened. Majerick, Jr., was Secretary of the Union and Miller knew he belonged to the Union so instead of being discriminated against, he received better treatment than he deserved (R. 163-164).

The Board which did not see the witness, reversed the Examiner basing its finding entirely on the inference that because Majerick, Jr., had become prominent in the Union and had received a prize for securing the most members a few days before, necessarily that was the reason for his discharge.

The Board stated, "In view of his (Miller's) hostility toward the Union, together with the fact that his dislike for Majerick coincided with the latter's rise to prominence in the Union, we are persuaded that Majerick's leadership in the Union afforded the cause for Miller's antagonism

toward him and such antagonism was the real cause for his discharge'' (R. 56).

There is no substantial evidence to support this finding. Miller's ''antagonism'' consisted in failing to discuss ''base ball, fishing, foot ball and general news'' with him (R. 87); and Miller's attitude was justified because Majerick had refused to obey the orders of his foreman, and had been making himself very obnoxious. Majerick always was an unruly employee; sometime before, he had urinated at the side of his machine; he was stubborn and insubordinate and did not get along with the men, and ''more than one of them wanted to give him a poke'' (R. 172). When he became active in the Union, he felt he was above any orders; he resented being placed on suede machines, and when he was told to change some sand paper, he told his foreman ''to go fuck'' himself, and if he ''wanted the fucking paper'' he could put it on himself, and refused to put it on (R. 190). Majerick admitted that when Miller laid him off he gave his reason ''Maybe it was the argument you had upstairs'' (R. 86).

The Examiner found ''From all of which it appears that it was the intention of the respondent company, when it learned of the insubordination and the use of vile and unprintable names by Majerick, Jr., toward his then foreman, Max Lehman, that said Majerick, Jr., should be forthwith discharged'' (R. 29, 30).

That Miller, the foreman, disobeyed orders in retaining him because of his friendship for his father, should not be charged against the respondent.

The trial Examiner noted Majerick's evasiveness and justifiably did not believe anything that he said. The Regional Director and Cunningham, the Union President, saw him too and took the same view that the trial Examiner did, and refused to recommend his reinstatement.

Clark, J., in his dissenting opinion said:

> "The writer agrees with the trial examiner's interpretation of the evidence and is glad to record his belief that he is 'that honest mind dispassionately probing into the facts' whom evidence must convince if it is to be found substantial."

He then quotes the examiner's findings Nos. 21, 22, 23 and 28 (R. 26, 27; 30) and continues:

> "The findings indicate an inefficient and quarrelsome employee whose resentment at criticism took the not unusual form of abuse of his detractors. He freely employed the four letter words stale in Elizabeth's time but pleasantly startling in ours. That same energy may have enhanced his value as a union organizer. The Board's refutation of their employee leaves them, in the writer's opinion with the insufficient scintilla only. It is based on payment before pay day and retention of junior employees." (R. 228)

As to Frank Majerick, there is no substantial evidence in the record to justify a finding that he was dismissed for Union activities.

Burk Brothers business has become less and less, and in 1937 it was necessary to cut production from about 1000 dozens a day to 300 dozens. This necessarily required a large reduction in employees and out of a lay-off of upward of eighty men, Frank Majerick was the last to be laid off. It was known for months that he was a member of the Union, as he wore a C. I. O. button on his hat. The trial examiner found:

> "29. *Frank Majerick.* (also known as Frank Mayerick, hereinafter referred to as Majerick, Sr.) was first employed by respondent in 1907 as a sorter and worked until 1911 when he left the respondent's employment. His next employment with respondent began in 1928. He joined the Union in 1937, and during at least four

months of the time from June 1937 to January 27, 1938, he wore a C. I. O. button on his cap and shirt or coat. * * * (R. 30)

30. President Fitzpatrick testified that respondent recognized the rule of seniority. Majerick Sr., claimed seniority over one Mitas. The record shows that Mitas worked for respondent from 1910 to 1917 and was out of such employment from 1917 to 1919 as a result of war service. He returned to work for respondent and worked from 1919 until 1933, when he again left the service of the respondent, returning March 22, 1937, and has been steadily employed since except when he was absent due to illness. The record shows that his seniority rights were restored in 1919 upon his return from such war service. Mitas has a "total service with respondent of 24 years with the last continuous service dating from March 1937. Majerick, Sr. has a total service of 14 years with the last continuous service dating from 1928. Miller testified that he did not consider Mitas had lost his rights or seniority since he had granted him a leave of absence owing to shortage of production at the time he last left respondent's employment. (R. 31)

31. John Miller, a son of Foreman Miller, entered the employment of respondent December 17, 1934, and has been continuously employed as a glazer and a sorter since that date. He receives less pay than a journeyman glazer and it appears that he performs some duties other than that of a glazer. It further appears that Majerick, Sr., actually had seniority over Miller, Jr., and was capable of performing all of the duties performed by Miller, Jr. It appears that President Fitzpatrick did not know of Miller, Jr.'s employment at the time of Majerick, Sr.'s lay-off. (R. 31)

32. Miller, Sr., testified that he was training his son in the tanning business for the future with the view that the latter would eventually succeed to the former's position. It appears, and the undersigned hereby finds, that under the rules of seniority recognized in respond-

ent's plant, that Miller, Jr., should have been discharged because of reduced production in the plant, instead of Majerick, Sr. It further appears, however, and the undersigned finds, "that Miller did not lay off Majerick, Sr., because of the latter's union activities, but did lay him off in order that his son might retain his position and that while such action on the part of Miller, Sr., was highly unfair to Majerick, it is not and was not an unfair labor practice under the Act." (R. 32)

33. The record shows that Majerick, Sr., was and is a competent glazer; that he is and was well liked by respondent and Foreman Miller. He was offered reemployment as a laborer in October 1938 and again on December 5, 1938, by letter which offer he declined without a written guaranty to the effect that when production increased he would be returned to the glazing department. The record shows, and the undersigned hereby finds, that Frank Majerick was not discharged, as alleged in the complaint herein, but was laid off on January 28, 1938, by Fred Miller, foreman of the respondent, by reason of a reduced demand (amounting to approximately 40 per cent.) for the goods manufactured by respondent, and further, said Miller made such a lay-off of said Majerick, Sr., in order that he might retain his son John Miller, in the employment of the respondent. Such lay-off was not occasioned by the Union activities of said Majerick, Sr., and while it was unfair to Majerick, Sr., under the circumstances it is not an unfair labor practice as is contemplated by the Act. The complaint, in so far as it alleges the discriminatory discharge of Frank Majerick, should be dismissed." (R. 33)

If Frank Majerick had not been a member of the Union, would there have been any unfairness in laying him off, in view of the reduction in force necessitated by the greatly reduced output? Most certainly not.

As to Frank Majerick, Clark, J. said:

> "The Board's argument here seems ever more tenuous. Their contention is again one of seniority over retained employees. One of these was the foreman's son and the Board finally appears to have abandoned its naivete. The other was only technically junior and its assertion is not entirely creditable. He had been employed for ten years longer than Mitas and his loss of seniority, if any, was due to the interruption of overseas service and a subsequent illness thereto. Moreover, Majerick, a glazer, had been offered employment as a laborer and no glazers have been hired since his departure" (R. 228).

Miller, Jr., also did different kinds of work from Majerick.

As to the claim of seniority over Mitas, the Examiner found Mitas had a total service of 23 years which had been interrupted by service overseas, where he had been gassed; and that Majerick had a total service of 14 years. Respondent felt Mitas was entitled to special consideration because of his war record, and consequent illness, and he was given leaves of absence.

As Clark, Jr., said:

> "The case at bar seems to the writer a reductio ad absurdum of the rule. This issue is the common one of discriminatory discharge. The Board's trial examiner who by definition, saw and heard the witnesses recommended the reinstatement of two employees and refused to so recommend as to two others. A year later, the Board, which equally by definition did not see and hear the witnesses reversed their own examiner. It is true that the statute seems to justify such a plain disregard of the demeanor rule. It makes the findings those of the Board. The courts have, however, as we have seen, qualified the legislative 'evidence'." (R. 224.)
>
> "The writer agrees with the trial examiner's interpretation of the evidence and is glad to record his belief that he is that "honest mind dispassionately prob-

ing into the facts" whom evidence must convince if it is to be found substantial (R. 225).

"One man was an undesirable employee and the other a victim of economic conditions."

Appended to the Report of this case in 117 F. 2nd 686, there appears the following note:

"* * * However, a disagreement between the Board and the trial examiner may indicate that a conclusion contrary to that of the Board is at least a reasonable one and may, therefore, properly be treated by the courts not as a factor to be weighed with the evidence, but as an indication that the evidence deserves, closer examination. See International Ass'n of Machinists *v.* N. L. R. B. (1939, 71 App. D. C. 175), 110 F. (2d) 29, 34." Administrative Law-Judicial Review-Conclusion of Trial Examiner Contrary to that of Board Held to Detract Materially from Evidence Supporting Board's Finding, 54 Harvard Law Review 687, 689 (note)."

As was said by this Court in *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197:

"We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence shall be conclusive,' means supported by substantial evidence. Washington V. and M. Coach Co. *v.* National Labor Relations Board, 301 U. S. 142, 147. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court directed to the United States Court of Appeals for the Third Circuit, demanding that the court send to this Court for its review and determination on a day certain to be therein named, a full and complete tran-

script and all proceedings in the case entitled on its docket No. 7412 of October Term, 1940, Burk Brothers vs. National Labor Relations Board, to the end that said court may be reviewed and determined by this Honorable Court; that the errors which have occurred therein may be corrected, and that judgment of the said Circuit Court be reversed, and that the petitioner may have such other and further relief as may be appropriate.

Respectfully submitted,

BURK BROTHERS,
By WALTER T. FAHY,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and it is not filed for the purpose of delay.

WALTER T. FAHY,
Counsel for Petitioner.